error to the supreme court. Had that been its original judgment, it is not believed that this court would have reversed it; and we do not think that as now rendered, it can be held to be erroneous. The judgment is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the court for the correction of errors of the state of New York, and was argued by counsel: On consideration whereof, it is the opinion of this court, that there is no error in the judgment of the said court for the correction of errors of the state of New York, quashing the writ of error from the supreme court of judicature of New York; whereupon, it is ordered and adjudged by this court, that the said judgment of the said court for the correction of errors be and the same is hereby affirmed, with costs.

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*326] *William King, Appellant, *v.* John Mitchell *et al.*, Appellees.

Creation of a trust.

William King in his will, made the following devise: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King (the appellant), son of my brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King, or of sister Elizabeth, wife of John Mitchell, and to their issue."

Upon the construction of the terms of this clause, it was decided by this court, in 3 Pet. 346, that William King, the devisee, took the estate upon a condition subsequent, and that it vested in him (so far as not otherwise expressly disposed of by the will), immediately upon the death of the testator. William Trigg having died without ever having had any daughter born of his wife Rachel, the condition became impossible; all the children of William Trigg and Rachel his wife, and of James King and Elizabeth Mitchell, were married to other persons; and there had been no marriage between any of them, by which the devise over, upon the default of marriage of William King (the devisee) with a daughter of the Triggs, could take effect.

The case was again brought before the court, on an appeal by William King, in whom it had been decided the estate devised was vested in trust; and the court *held*, that William King did not take a beneficial estate in fee in the premises, but a resulting trust for the heirs-at-law of the testator.

There is no doubt, that the words "in trust," in a will, may be construed to create a use, if the intention of the testator, or the nature of the devise requires it; but the ordinary sense of the term is descriptive of a fiduciary estate or technical trust; and the sense ought to be retained, until the other sense is clearly established to be that intended by the testator. In the present case, there are strong reasons for construing the words to be a technical trust; the devise looked to the issue of a person not then in being, and, of course, if such issue should come *in esse*, a long minority must follow; during this period, it was an object with the testator, to uphold the estate in the father, for the benefit of his issue; and this could be better accomplished by him, as a trustee, than as a guardian. If the estate to the issue were a use, it would vest the legal estate in them, as soon as they came *in esse*; and if the first-born children should be daughters, it would vest in them, subject to being divested by the subsequent birth of a son; a trust estate would far better provide for these contingencies than a legal estate; there is then no reason for deflecting the words from their ordinary meaning.[1]

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[1] The estate of a trustee is commensurate with the purposes of the trust, and ceases when there are no further duties to perform. McMullin *v.* McMullin, 8 Watts 236; Koenig's Appeal, 57 Penn. St. 352; Poor *v.* Considine, 6 Wall. 458.

King v. Mitchell.

*Appeal from the District Court for the Western District of Virginia.

At January term 1830, the case of Alexander Finlay and John Mitchell *v.* William King's Lessee, came before this court, on a writ of error to the district court of the United States for the western district of Virginia. (3 Pet. 346.) That was an action of ejectment, and the question involved, and decided by the court in it was, as to the construction of the will of William King, deceased, formerly of Abingdon, Virginia. The suit was instituted against the present appellees, to recover a part of the real estate of the testator, William King, which the defendants claimed, as two of the co-heirs of the testator, and on which they had entered, with the consent of all the co-heirs, for the purpose of trying the title of the plaintiff, now appellant, as devisee under the will. In that action, judgment for the land in controversy was given by the district court, in favor of the plaintiff, on a case stated.

On the removal of the case to this court, the judgment of the district court was affirmed, and the court held, that all the real estate of William King, deceased, was devised to William King, the appellant; but the possession of part of it, which was given to his wife and others, was postponed until her death. The court also proceeded to say, that "the question, whether William King took an estate, which, in all the events that had happened, inures to his benefit, or whether he is, in the existing state of things, to be considered '*trustee*' for the heirs of the testator, could not be decided in that case. That question belongs to a court of chancery; and will be determined, when the heirs shall bring a bill to enforce the execution of the trust." (3 Pet. 383.)

The appellees, as heirs-at-law of William King, deceased, in September 1830, filed a bill in the district court of Western Virginia, against the appellant, William King, in which they alleged, that the estate so devised was held by the appellant, William King, as a mere trustee, holding the beneficial interest for the testator's heirs-at-law; and they prayed, that the said William King might be compelled to execute the trust confided to him by the said will, in such manner as the court should think proper; that the proceedings on the said judgment might be stayed, until the case could be fully heard, and *that a perpetual injunction might be directed; and [*328
that such other and further relief in the premises might be given, as their case might require, and as might be consistent with the principles of equity. The bill also prayed for an injunction to stay proceedings on the judgment in the ejectment. The district court gave a decree, according to the requirements of the bill, and the defendant appealed to this court.

The case agreed in the suit at law, and upon which the questions argued before the court in this case were presented, was as follows:

We agree, that William King departed this life on the 8th day of October 1808, having first made and published his last will and testament, which was afterwards admitted to record in the county court of Washington county, in Virginia, where he resided, and is in the words and figures following:

"Meditating on the uncertainty of human life, I, William King, have thought proper to make this my last will and testament, leaving and bequeathing my worldly estate in the manner following, to wit: to my beloved wife, Mary, in addition to her legal dower of all my estate, the

dwelling-house and other buildings on lot No. 10, in Abingdon, where I now reside, together with the garden, orchard, and that part of my Fruit Hill plantation, south of the great road, and lands adjacent to Abingdon, now rented to C. Finlay & Co., and at my father's decease, including those in his occupancy, on the north side of the great road, for her natural life.

"I also will and declare, that in case my beloved wife, Mary, hath hereafter a child or children by me, that the said child or children is and are to be sole heirs of my whole estate, real and personal, excepting one-third part of specified legacies and appropriations hereinafter mentioned, which, in case of my having children, will reduce each legacy hereinafter mentioned to one-third part of the amount hereafter specified, and the disposition of the real estate, as hereafter mentioned, in that case wholly void. In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel, his wife, lately Rachel Finlay, in trust for the eldest son or *issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King, or of sister Elizabeth, wife of John Mitchell, and to their issue; and during the lifetime of my wife, it is my intention and request, that William Trigg, James King and her, do carry on my business in copartnership, both saltworks and merchandising, and equal shares; and that in consideration of the use of my capital, they pay out of the same the following legacies:

*329]

"To John Mitchell, on condition of his assisting and carrying on business with them, at the usual salary as formerly, viz., $1000 per year, for from two to five years, as they may with his assistance, an additional sum of $10,000, payable five years after my decease; and to each of his children, on coming of age, $1000 more than the general legacy hereafter mentioned, To Connally Finlay, a like sum of $10,000, payable in five years. To my nieces, Elizabeth Finlay and Elizabeth Mitchell (being called for my grandmother, with whom I was brought up), $10,000, in twelve months after marriage, provided they are then eighteen years of age, if not, at the age of eighteen; to each of my other nephews and nieces, at the age of eighteen, that is, children of my brother James, sisters Nancy and Elizabeth, $1000 each; to each of the children of my brother Samuel, and half-sister Hannah, $300 each, as aforesaid; to my said sister Hannah, in two years after my decease, $1000; and to my half-brother Samuel, in case of personal application to the manager, at Saltville, or to my executors, in Abingdon, on the 1st day of January, annually, during his life, $150; if not called for on said day, to be void for that year, and receipt to be personally given.

"It is my wish and request, that my wife, William Trigg and James King, or any two of them that shall concur in carrying on the business, should join with all the young men that may reside with me, and be assisting me in my decease, that are worthy, or furnish them with four or five thousand dollars' worth of goods, at a reasonable advance, on a credit of from three to *five years, taking bonds with interest, from one year after supply. In case my brother James should prefer continuing partnership with Charles S. Carson, in place of closing the business of King, Carson & King, as soon as legal and convenient, then my will is, that Wil-

*330]

liam Trigg and my wife carry on the business, one-third of each for their own account, and the remaining third to be equally divided between the children of my brother James, and sisters Nancy and Elizabeth.

"To my father, Thomas King, I leave, during his life, the houses he now resides in and occupies, at Fruit Hill, together with that part of my land, in said tract north of the great road, that he chooses to farm, with what fruit he may want from the orchard; the spring-house, being intended for a wash-house, with the appurtenances, subject to the direction of my beloved wife, Mary; as also the orchard, except as aforesaid. I also leave and bequeath to my father, the sum of $200 per annum, during his life; and if accidentally fire should destroy his Fincastle house and buildings, a further sum of $220 per annum, while his income from these would cease. I also leave and bequeath to the Abingdon Academy, the sum of $10,000, payable to the trustees, in the year 1816, or lands to that amount, to be vested in said academy, with the interest or rents thereon, for ever.

"Abingdon, Virginia, 3d March, 1806. WILLIAM KING.

"I hereby appoint William Trigg, of Abingdon, and James King, of Nashville, executors of my last will and testament enclosed; written by my own hand, and signed, this 3d day of March 1805. WILLIAM KING."

We agree, that William King, at the time of his death, was seised and possessed of seventy-six tracts of land in the said county of Washington, containing, in the whole, 19,473 acres of land, on one of which tracts is the salt-works, which have, since his death, been leased for years at the annual rent of $30,000. Also, of nineteen lots in the town of Abingdon, in Washington county, nine of which produced an annual rent of $660. Also, of fourteen tracts of land in the county of Wythe, containing 3494½ acres. *Also, of eighteen tracts of land in the state of Tennessee, containing, in the whole, 10,880 acres. Also, of shares in town lots, in several [*331 of the towns in the state of Tennessee. We also agree, that the said William King survived his father, in the said will mentioned; that the said William King had brothers and sisters, to wit, James King, a brother of the whole blood; Nancy, a sister of the whole blood, the wife of Connally Finlay, in the will mentioned; Samuel King, a brother of the half blood; Hannah, a sister of the half blood, the wife of John Allen; all of which brothers and sisters, before named, survived the said William King. That another sister of the said William King, of the whole blood, died before him, and was named Elizabeth, the wife of John Mitchell, who is mentioned in the will. We agree, that William King, the lessor of the plaintiff, is the same William King, the son of James King, brother of the testator, mentioned by him in the will. We further agree, that William Trigg, in the will mentioned, departed this life on the 4th day of Angust 1813, leaving Rachel Trigg, in the will mentioned, his widow, and four sons, the said Rachel having borne them to the said William, and not having borne any daughter to him, the said William Trigg, at any time, which said sons are all living. That Mary, who was the wife of the said William King, is still living, aged 43 years, and is now the wife of Francis Smith. We further agree, that William King, the lessor of the plaintiff, is married to Sarah Behum; that James King had only one daughter, named Rachel Mary Eliza, who is now the wife of Alexander McCall; and that Elizabeth, the wife of John Mit-

chell, had only two daughters, to wit, Elizabeth, who is now the wife of William Heiskell, and Polly, who is now the wife of Abraham B. Trigg. We agree, that William King, the testator, died seised and possessed of the house and lot in the declaration mentioned. We agree the lease, entry and ouster, in the declaration supposed, and that the defendants are in possession of the house and lot in the declaration mentioned. If, upon this state of facts, the lessor of the plaintiff ought to recover at this time, we agree, that judgment shall be entered for him ; and that, if the court shall be of opinion, that he *ought not to recover until after the death of Mary, the wife of Francis Smith ; or that he ought not at any time to recover, judgment shall be entered in favor of the defendants."

*332]

The case was argued by *Webster* and *Jones*, for the appellants ; and by *Coxe*, for the appellees.

Webster, for the appellant.—This court have decided, 3 Pet. 383, that the legal estate in the property in question, has passed, under the devise in the will, to William King, the appellant. It is given to him in trust for the eldest son or issue of a marriage which can never happen ; and none of the anticipations of the testator, in the happening of which the estate would pass from the devisee, can occur. *Trust*, therefore, in the case before the court, means *use*. It was the intention of the testator, to vest the whole estate in him ; which could be divested only if persons came into existence who would take it, and thus divest it. This is not a case in which the words of a will are to be construed to pass a fee, but to enable a benefit to be enjoyed by the object of the testator's bounty.

The will has been decided to be a will to divest the heirs-at-law ; but the object of the complainants is, to establish that the very person who takes the estate, does so for the benefit of the very heirs out of which it has passed by the will. This is not a usual case, and must be shown to exist by extraordinary circumstances. It will be difficult to put this construction on the will, as, from the beginning to the end of it, there is no disposition to throw the estate into the hands of the trustees. In every part of it, there is a manifest purpose of placing it in the exclusive ownership of some one individual.

When an estate has been clearly established to have passed out of the heir-at-law, it will be difficult to fix such an estate in trust for the heir. If a trust is raised in such a case, the estate has not passed by the will. It is apparent, that the testator meant that William King should have the estate, without the interference of the heirs-at-law, to some extent. The general object was, to give the estate to his own family, bearing his own name, and who should be as near to him as any one, except his brother. It is a principle of our nature, to *dispose of property in the descending, and not in the ascending line.

*333]

If William King had married, as the will provides, he would clearly have taken a beneficial interest. This would have been according to the very words of the will. It has been settled, that he took the legal estate, and his holding it finally, depended on a condition subsequent, which condition he had his whole life to perform, unless by the extinction of the family into which he was to marry ; and the will makes no provision for the holding during that time. It is now ascertained, that the condition subse-

quent became impossible to be performed. 2 P. Wms. 628; 1 Cruise 469; 1 Atk. 618. This question was argued, in the former case, by General Smyth, and the court are referred to that argument as fully applicable here. 3 Pet. 369.

The condition of marriage is inconsistent with the idea of William King being a trustee. If he had married, according to the terms of the will, he would not have been a trustee, but would have held the estate absolutely. 2 Atk. 150; 2 Vern. 645. Cases cited in the argument of the former case: 1 P. Wms. 309; 1 Meriv. 301, &c. See 3 Pet. 373. Where there is a consideration, there can be no resulting trust; 7 Bacon, ch. 143: and in this case, the consideration was marriage.

Coxe, for the appellees. There are, under the will, but two questions: 1. Does William King, the appellant, take an estate in trust? 2. If he does, how does this affect his beneficial interest in the property so taken. All the contingencies having failed, who takes the estate beneficially?

William King took the legal estate, and held it upon a condition subsequent, which becoming impossible, the estate is as if no condition had been annexed to it in the devise, and the devise never took effect. It is contended by the appellants, that the condition attached to the equitable, as well as to the legal estate. On the other side, it is said, the condition attached only to the legal estate. *In support of the latter position, there is the opinion of Mr. Justice JOHNSON, in 3 Pet. 385, 387, 389, who dissented from the court in the case at law, and who pronounced the true interpretation of the will; and although the rest of court declined to indicate an opinion, yet great support is derived from what is said by the court. [*334

There are two conditions. One precedent, that of the wife of the testator having a child; and no child was born subsequent to his death: and the other subsequent, which was the marriage of William King; and that marriage has become impossible; thus a state of things is presented not contemplated by the will. There being no devise over, in the event of the failure of the contingencies, the estate is vested in William King, at law, in trust for all the heirs of the testator. It was not the intention of the testator to give any beneficial interest in the estate to William King.

There can be no doubt, that if the testator had left one child, that child would have been the sole heir; if he had left ten children, they would have taken in equal proportion; such are the provisions of the will. There is nothing to indicate any intention, that if the first clause in his will had taken effect, the whole estate was to pass into a single hand, or to remain undivided. Had William King married a daughter of William Trigg, &c., he as clearly would have taken the estate, under the second clause, for the condition would then have been performed. But how, and to what extent? Clearly, as the will says, and as the court said, in trust for the eldest son or issue of that marriage. Had there been issue of that marriage, could any doubt have existed, but that the equitable estate would have vested absolutely.

It is not material to discuss the possible question, whether the eldest son would have taken to the exclusion of others; it is obvious, that had one son only been the fruit of that marriage, he would have been the

individual upon whom the estate would have devolved; had there been ten daughters, they would have all taken.

The court has said, that the will is to be construed "as if the contemplated marriage had been actually consummated." 3 Pet. 381. So it is to be construed as if the contemplated issue had actually been born. Again, in the same opinion, the *court say, "it was not very probable, at the *335] date of the will, that the devisee of this immense fortune might come into existence in less than twenty years." If William King was the devisee, he was actually in existence. And the court must, therefore, have considered, that not he, but his issue by a marriage with a person then unborn, was to be the devisee. In the examination of this clause, we cannot but observe, that in framing it, the testator looked to the single contingency, that he should die without issue. He has omitted entirely to provide for the contingency of such issue dying at an early period of life. So, in the limitation over to the child of William and Rachel Trigg, who might marry, as provided in the will; he has again placed it upon the single contingency of there being no such marriage as he had already contemplated, between William and a daughter of William Trigg, without adverting to the possibility of there being no issue of such marriage, or of such issue becoming extinct. Had there been a child of William and Rachel Trigg, who had actually married, as the testator contemplated, the limitation over to such individual, would have taken effect. The whole estate given to William King would, in that case, have terminated. The intention of the testator is manifest and undoubted as to this point. The will, however, as the court remarked, is to be construed as if the contemplated contingency had actually occurred. But this rule of construction is disregarded, this intention of the testator overlooked, by adopting the views of the appellant. 3 Pet. 381–2.

If William King took the whole interest under the will, legal and equitable, upon the condition attached to it by the testator, that condition being a condition subsequent, its becoming impossible is to operate precisely in the same manner as its fulfilment. The fulfilment would have been by the marriage; that marriage became impracticable. The estate, therefore, vesting in him, precisely as if the condition had been performed, it is obvious, that upon the construction contended for by the appellant, the words, "in trust for the eldest son, or issue of said marriage," must be erased from the will, as insensible and nugatory. Had such issue come into existence, it *336] could not *have affected the interest already given to William King, the father.

It appears to us, that this would be equally repugnant to the language of the will itself, and to the opinion pronounced by this court. The language of the court is (p. 378), "the residue was given to William King immediately, on the trust mentioned in the will, or given by implication to the testator's wife, or was permitted to descend to his heir-at-law." It is here distinctly asserted, that what estate William King did take, he took in trust. And in p. 381, "his primary object then is, the issue of a marriage between his nephew, William King, and a daughter of William Trigg, by his then wife;" not to vest the whole estate in William King himself, but passing him by, as regards the beneficial interest, to look to the issue of such marriage, and provide for them. Further (p. 383), the court says, the "intention, we think, was, to devise his whole estate to William King in trust."

If the appellant be correct, we must go further, we must erase from the will, not only the expression which points to the issue as the object of the testator's bounty, instead of William King himself, but the whole of the succeeding clause. For, if William King takes the whole interest, independently of any trust, and the fulfilment of the condition, or its becoming impossible, are equally operative; the limitation over never could have taken effect, even although a child of William and Rachel Trigg had married a child of James King or Elizabeth Mithell. This is the necessary corollary from the appellant's proposition. The will is to be construed as if the object of the testator had not been defeated (p. 381). The second object of the testator, "was the issue of any marriage which might take place, between any child of William and Rachel Trigg, and any child of his brother James, or of his sister Elizabeth; that both of these objects have been defeated by the course of subsequent events, does not change the construction of the will." Not only is such thus declared to be the intent of the testator, but the provision is pronounced to be a valid one (p. 381–2).

"Had William King, the devisee, died young, or had William and Rache Trigg died, without leaving a daughter, a fact which has actually happened, and any child of William *and Rachel Trigg had married a child of [*337
James King, or Elizabeth Mitchell, then the whole estate is given to such child, and to the issue of the marriage. Had either of these events taken place, the estate is given from the heirs. This is wholly incompatible with the position of appellant, that "he did not take *ab initio*, under the will as trustee, for any use or purpose whatever;" but that he "took and held it beneficially for himself." These important clauses cannot be rejected. 10 Wheat. 225.

In regard to this last limitation, it is observable, that it is to take effect upon the single contingency, that William King should not marry as was contemplated. Had he actually so married, this limitation over never could have taken effect; even had he died the next day, and left no issue. The testator has not provided for the case of the marriage actually taking place, unaccompanied by issue; or for that of such issue becoming extinct. These events not being provided for, had either of them occurred, the estate must have devolved upon the heirs. Nor has the testator made any provision for any state of things beyond the marriage of a child of William Trigg to one of the children of his brother or sister. The instant that state of things occurred, the whole estate would have vested absolutely in the individual who came within the terms of the limitation; and no provision is made for any failure of issue of such marriage.

Viewing the will in this aspect, it is manifest, that there were various possible, nay, probable contingencies, for which the testator had omitted to provide; and had either of them occurred, the estate must have gone in the regular course of descent.

1. Had the testator died, leaving a child by his wife Mary, and such a child had survived him but a single day, the estate must have gone to the heirs of such child; for the absolute estate had vested, and the subsequent limitation over was to take effect upon the single contingency of there being no such child.

2. Had the contingency contemplated in the devise to William King, the condition expressly annexed to it, happened, viz., his marriage; and had

there been issue, a son, of such marriage, upon the death of that son, if its
*338] father had taken, *as we suppose, merely a trust for the use of such son, the estate would have gone as the law prescribes, for there is no limitation over in such case.

3. Had there been a child of William Trigg, who had married as contemplated, the absolute interest would have vested, for nothing beyond that is provided for.

The provisions of the will are tolerably precise and distinct; but it is owing to their particularity and minuteness of detail that the present difficulty arises. Testators, like legislators, succeed best, and most effectually avoid litigation, when they avoid an enumeration of all the various circumstances for which they design to provide.

It must be conceded, that a state of things has occurred, which the testator did not anticipate, and for which he did not, as we read the will, provide. Neither one of the clauses has taken effect, as we understand this instrument; certainly, none has taken effect in the mode he contemplated. What then is the result? The result of a total failure of all the provisions of the will, would necessarily be, as this court said in the former case, to cast the real estate upon the heirs; this is so obvious, by the doctrine of the law, that it is unnecessary to do more than distinctly to state it. All the interest in real estate which is not clearly devised to some other person, descends to the heir. In the application of this general principle, it is equally and wholly immaterial, whether there was a defective execution of the will, which prevented it from taking effect; or an omission to include a part of the property; or an insufficient description, either of the thing devised, or of the party who is to take; or the occurrence of a contingency for which the testator omitted to provide; or a failure of the party who was designed to have the estate. In each and all these cases the heirs will take. It is not sufficient, that the court may entertain a private opinion of the intention of the testator, or be satisfied what he would have done, had he correctly anticipated the future. "It must," to use the language of this court in *Wright* v. *Page*, "it must see that he has expressed that intention with reasonable certainty on the face of the will; for the law will not suffer the heirs to be disinherited upon conjecture. He is favored by its policy; though the tes-
*339] tator may disinherit him, yet the law will *execute that intention only when it is put in a clear and unambiguous shape." 10 Wheat. 228. The appellant is here encountered by the same difficulty which presented itself in that case. He says, the intention of the testator was, that the heir should not take, so it is in all cases where the provisions of the will fail (from any of the causes that have been enumerated); that it was his intention that the estate should go to a single individual, and not be split up among numerous parties; that this valuable estate should be retained among those who bore his name, and inherited his blood; among those, especially, who would reunite his wife's blood with his own. He may go further than all this, and insist, that had the testator anticipated what has occurred, he would have expressed his intent, that appellant should take, in the clearest and most explicit terms. The court must, nevertheless, say, as in *Wright* v. *Page*, "the testator may have intended it, and probably did; but the intention cannot be extracted from his words, with reasonable certainty, and we have no right to indulge ourselves in mere private conjectures."

The learned editor of Powell on Devises found it necessary to introduce a caution, "that the language of the courts, when they speak of the intention as the governing principle, sometimes calling it 'the law' of the instrument, sometimes 'the pole star,' sometimes 'the sovereign guide,' must always be understood, with this important limitation, that here, as in other instances, the judges submit to be bound by precedents and authorities in point; and endeavor to collect the intention, upon grounds of a judicial nature, as distinguished from arbitrary conjecture." 2 Powell on Devises, 3. Even in cases where no reasonable doubt could exist as to the intention of the testator, in point of fact, as where, in the will of an unlettered person, real and personal property are comprehended in the same clause; the absolute estate in the one passes, and only a life-estate in the other. It was in reference to this class of cases, that Lord MANSFIELD, in *Right* v. *Sidebotham*, 2 Doug. 759, said, "I verily believe, that almost in every case, where, by law, a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted."

In reference, however, to the will under consideration, the *intent, [*340
of which the appellant invokes aid, is by no means obvious or unquestionable. It is not the paramount purpose of testator's mind. In the particular instances for which he has expressly provided, and subject to the modifications which he has distinctly prescribed, the intent may be recognised, but it does not follow, that it reached beyond those contingencies. Thus, in the particular clause under consideration, it is beyond doubt, that the testator designed the appellant to take, on the condition specified, and in trust for the issue of the contemplated marriage. This is the intention of the limitation, as clearly indicated; but the whole of this intent must be taken together. It cannot be logically inferred, that he was designed to take, without performing the condition, or to take discharged of the trust. It is not by any means apparent, that the testator regarded him as the peculiar object of his bounty; he did not unite in him the two distinct bloods; he is not an individual who proceeded "from the union of his own family with that of his wife," whom the court considered it as the primary intention of his own family to provide for. "His primary object," says the court, immediately after, "is the issue of a marriage between his nephew, William King, and a daughter of William Trigg by his then wife," not William King himself: no such intent is expressed on the face of the will, as to give him, in his own right, for his own benefit, any portion of the estate; and until he can show title under the will, the heir must take. *Barker* v. *Wood*, 9 Mass. 419.

So far as any peculiar or especial object of the testator's favor can be ascertained from the face of the instrument, it was obviously the family of William Trigg. The devise to the appellant is clogged with a condition, that he should marry a daughter of Trigg; that clause failing, the estate is limited, by the succeeding clause, to any child of Trigg, who should marry as there prescribed. William Trigg is to have one-third of the business and capital; and he is further made executor. Yet, with this especial preference, so uniformly manifested in every part of the will, the construction contended for by the appellant, would reject the whole of this branch of the testator's relatives. Nor is it easy to perceive the foundation upon which the assertion is based, that appellant was the favored object of *the testator's [*341

bounty. The clause under consideration is the only one throughout the will in which he is named. The whole argument involves a *petitio principii;* if, by the true construction of the will, he takes the whole of this valuable property, he is, in fact, the most favored of the testator's family. If this construction accords with the actual design of the testator, the argument is well founded; but the premises being established, the conclusion becomes unimportant. If he does not take under the will, to the extent of his claim, there exists no foundation for this reasoning; if he does so take, it is superfluous.

The court, in 3 Pet. 380–1, considered it as proved, that it was "the primary intention of the testator, to keep his immense estate together, and to bestow this splendid gift on some individual who should proceed from the union of his own family and that of his wife." If the first part of this design was alone to be regarded, it would have been equally effected by a descent to the heir, under the circumstances which existed at the date of the will; for the testator's father was then his sole presumptive heir. If the latter part of this design is to control the construction of the will, it must be fatal to the appellant's claim; for, as has been before remarked, he does not come within the description. Nor can a part of this general design be disregarded. It will not do, to carry the first part into full execution, at all events, and to reject the last, which was far more interesting; to effectuate it, so far as regards the estate itself, and to exclude that portion of it which looked to the person who was to receive the property. But this inferential intention, deduced by refined reasoning from scattered clauses in the will, furnishes an unsafe exposition of the instrument. Fearne on Contingent Remainders 170–71.

In further corrobaration of these views, it is material to remark, that, according to the first limitation of this estate, the parties who were to take, viz., his own issue, would have been ascertained at the period of the vesting of the estate; there was no necessity for the interposition of a trustee, to preserve the property, or to keep alive the limitation. No trustee is, therefore, provided. So, in regard to the third limitation, the individual who *342] *was to take the benefit of it, is clearly indicated—must have been married, before it could vest, and there was as little reason for the intervention of any trustee. There was no such trustee appointed. The second clause is different; the party to take, according to the testator's intention, was the unborn issue of a marriage between the parties, one of whom was yet unborn. The propriety of creating a trustee, in such case, is obvious; and that of conferring this office upon the parent of the beneficiary, equally manifest. Such a construction, therefore, gives consistency to the instrument, and makes its provisions harmonious and reasonable. It is one of the fundamental rules of construction, 2 Powell 5, "that all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole." Again, p. 6, "nor can the meaning of words be varied by extrinsic evidence."

In the clause, the words are, "in trust, &c.," and we are told, "that words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected; and they are in all cases to receive a construction which will give them all effect, rather than one that will render some of them inoperative." 2 Powell, p. 8.

And "where a testator uses technical words, he will be presumed to employ them in their legal sense, unless the context contain a clear indication to the contrary." Here, then, appears to be a clear devise in trust, as deduced from the examination of the will itself, and from the well-established rules of construction. The case comes clearly within the language of Lord ALVANLEY, when master of the rolls, in *Malin* v. *Heighly*, 2 Ves. jr. 333, where he says, "I will lay down the rule as broad as this—wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly, that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." The Lord Chief Baron, in *Meredith* v. *Heneage*, 1 Simons 542, says, that in the language just cited, "he has extracted and stated the result of all the cases *before that time, and the subsequent cases have, it seems to me, made no alteration." [*343 The will contains the phrase "in trust," which Lord HARDWICKE, in the case of *Hill* v. *Bishop of London*, deemed so material, and to supersede the necessity of raising a trust by construction. 1 Atk. 620.

If the appellant, then, took, what he did take, in trust; if the property thus to be held is clearly described; if the persons for whom he is to take are distinctly marked; the question arises, whether, in the events which have happened, William King has an estate which inures to his own benefit? or is he to be deemed trustee for the heirs-at-law, the complainants in the court below. This is not a question as to the construction of the will, for the principle is perfectly well settled, "that the construction is not to be varied by events subsequent to the execution, 2 Powell 10; and this principle was fully recognised by this court in 3 Peters. It is a general principle of law which is involved, what becomes of the trust, when the objects of the creation, from any cause, are unable to take. To narrow down the question still more, it may be observed, that it is an immaterial circumstance, that an express provision is made in the will, for the heir. This was a point ruled in *Randall* v. *Bookey*, 2 Vern. 425, and in *Starkey* v. *Brooks*, 1 P. Wms. 390; 1 Chan. Cas. 196. Nor is it at all material, that the testator obviously designed to exclude the heir from inheriting this property; for, notwithstanding such obvious intention, as the court formerly observed, "this may be the result of a total failure of all the provisions of the will." If this circumstance were to operate, it would effectually shut out the heir, in all cases of the failure of the objects for which testator designed to provide, even if the will had in terms excluded the heir at all events. *Pugh* v. *Goodtitle*, 3 Bro. P. C. 454.

If we have succeeded in establishing, as the true and legal construction of the clause in which the appellant is named, that he took an estate, which, in case of his marriage as prescribed, and having issue as anticipated, would have inured exclusively *to the benefit of such issue; we have ad- [*344 vanced far in arriving at a solution of the present question.

It will be conceded, that there are no words in this will which can be understood as indicating any actual intention on the part of the testator, to enlarge the estate originally granted to the appellant, in case he did not marry, or leave issue of such marriage; on the contrary, the express language of the will is, that the ulterior limitation was not to take effect, in case said marriage did not take place. Whatever interest or estate the

appellant now has, he took at once ; there is no enlargement in terms. The question then is, admitting that he took as trustee for his own issue, in case he should have any, and therefore, as no such issue ever came into existence, the estate designed for them, never took effect ; and that the ulterior limitation in the succeeding clause, in like manner, wholly failed—do these failures inure to the benefit of the devisee or of the heir ? Is the estate, in the hands of the devisee, discharged of the trusts ? or the trusts having become extinct, does the beneficial interest descend upon the heir, as a part of the estate not disposed of by the will ?

In *Vezey* v. *Jamson*, 1 Simons & Stu. 69, the vice-chancellor said, the testator has given the estate "to the trustees, expressly upon trust ; and they cannot, therefore, hold it for their own benefit. The necessary consequence is, that the purposes of the trust, being so general and undefined that they cannot be executed by this court, they must fail together ; and the next of kin become entitled to the property." The heir is not to be disinherited, without an express devise or necessary implication ; such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed. 2 Powell 5.

It is denied, that the law is, that when there is a consideration, there can be no resulting trust. 3 Bro. P. C. 454. Cited also, 1 Simons & Stu. 69; 8 Petersdorff 91 ; 1 Hovenden's Notes on Vesey 364 ; 12 Ves. 415 ; 2 Powell on Devises 41, 49, 51 ; 1 Vesey & Beames 278.

*345] *Jones*, in reply.—There might have been a period when a doubt could exist, as to the question involved in this case, but that doubt cannot now prevail. The principles contended for by the appellant have been settled in the case at law. By that decision, the estate is, under the devise, in the appellant ; and it must remain in him. The testator intended a benefit to him, and he has it. To take the enjoyment of the estate from him, and make him a mere trustee for those towards whom the whole object of the testator was, to exclude them from the enjoyment of anything but the specific bequests, would be contrary to his manifest purpose. His object was, to select a particular person to hold the estate, and not as a mere conduit to convey it to others. If the complainants below could have any estate, it would be a legal estate ; and this, on the ground, that the whole of the objects of the will, that of limiting the property to the issue of particular persons, have failed. The devise was void, or a nullity. But this court have decided differently.

The case is to be considered : 1. As it stood at the testator's death. 2. Whether subsequent events have changed its situation. It is contended by the appellees, that William King took a mere naked trust.

Did he take the estate to this intent only, and answerable over for rents and profits? If this be so, those who now claim to be *cestuis que trust*, had the same interest from the beginning ; and that cannot be, under the decision of the court, that the legal estate vested in him on the death of the testator ; and the reasoning of the court, that the whole interest in the estate was disposed of by the will. Powell on Devises 189. Suppose, this had been a condition subsequent, and there had been a marriage to a daughter of Elizabeth Mitchell, and no issue ; what would have been the condition of the estate ? Would not William King have held the estate or

himself? There is no provision made in the will for the avails of the estate; and if William King took the estate, he had his whole life to perform the condition; he had the avails of the estate, in the interval given for the performance of the condition, as his *own. It is impossible to say, at what period this beneficial interest closed. Why has it been decided, that he should take the estate? Why not hold him to the condition? It is, because it is a condition subsequent and impossible, and the will is to be construed as if it had no conditional clauses in it. 2 P. Wms. 628; Com. Dig., Condition, D. p. 4; 1 Cowp. 469; 1 Atk. 618. [*346

It is important, that the court should consider the legal consequences to be attached to one or other view of this bill; and the court will, therefore, decide, where the equity jurisdiction begins, and the law jurisdiction ends. It is argued, that the use of the term "trust," gives the appellees all the rights which equity will give to a *cestui que use*. But these are only certain trust estates which, in courts of chancery, are treated as estates held in trust for the use of others. 1 Preston on Estates 142–90; Fearne on Cont. Rem. 158–9. As to jurisdiction, in cases where courts of equity attempt to distinguish estates held in trust from absolute estates: cited, 1 Madd. Ch. 448, 450.

Looking at the form of the devise, taking the principles of law as settled in the case, can it be said, that there is an outstanding *cestui que trust*, who is to have the whole of the beneficial interest in the estate of the testator, and that William King is but a bare trustee? There is no occasion to create a trust for such a purpose. The appellees might hold the property as an executory devise, or a springing use. The court of law having given judgment in favor of the devisee, against the heirs-at-law, is equivalent to saying, no use resulted to him. It would be impossible that it could be otherwise.

At the date of the will, William King was but two and a half years old; at the period of the testator's death, he was but five years old. Could it, by any possibility, have been intended to make him a trustee? The contingency of the estate vesting, being made to depend on the marriage of William King, and not on his having issue, it is shown, beyond all doubt, that the marriage was a personal *obligation; that a personal benefit was intended to him, should he perform the marriage. [*347

The true construction of the will is, that the estate is given to William King beneficially; and on the birth of a son, or his marriage according to the will, he should hold it for such son. If no son, as if no marriage, then the estate is in him. It was a beneficial estate to him, on an executory devise over to a son of the marriage. He has the estate, under the first part of the devise, and the second has not occurred. This is a construction according to the spirit and purpose of the will. It gives to the infant devisee his full benefit of the estate, until marriage and issue; and thus provided for one who was the object of the testator's bounty.

As to the consequences of a lapsed legacy, cited: 1 P. Wms. 277; 1 Bro. C. C. 61; 4 Ves. 802; 12 Ibid. 415; 1 Ves. & Beam. 276; 16 East 283; s. c. at law, 1 Simons & Stu. 69. A *hæres factus* is entitled to the same benefit as a *hæres natus*. Prec. in Chan. 2; s. c. 2 Vern. 120; 2 Powell on Devises, 667–9; 2 Atk. 439, note. It is contended, upon authority, and upon general principles, independent of the specific intent apparent

in this will, to exclude the heirs-at-law, that every benefit resulting from the failure or lapse of any charge upon the estate, or of any condition, or of any conditional limitation (such failure of condition not going to defeat the estate itself), results to the *hæres factus* of the estate, not to the *hæres natus;* and that either the value or the quality of the estate in his hands, thus enchanced by its exoneration from any such charge or condition or limitation, is so enchanced for him and as his estate, just as if he were *hæres natus:* a principle so much the stronger in its application to this case, as he is *hæres factus* of the whole, not merely of a part of the real estate.

When it is once ascertained, that the devisee is the person intended to be benefited, he is to have all the benefits of contingencies, and to have all the benefits which arose from relieving the estate devised from all charges, &c., 3 Madd. 453. Upon the effect of conditions becoming impossible, cited, 2 Powell on Devises, 251, 255, 263; 1 Preston on Estates 476; 1 P. Wms. 626; 1 Bro. C. C. 528.

*348] *Story, Justice, delivered the opinion of the court.—This is an appeal from a decree of the district court of the United States for the western district of Virginia, in a case, where the appellant was the original defendant, and the appellees the original plaintiffs in equity.

The bill was brought by the plaintiffs, as heirs-at-law of William King, deceased, to obtain a perpetual injunction of a judgment at law, upon an ejectment, in which a recovery was had by the appellant, of certain parcels of land, which he claimed as devisee under the will of the said William King, deceased. The case in which the recovery was had, came before this court, upon a special statement of facts, agreed by the parties, at January term 1830, and will be found reported in 3 Pet. 346. In that case, all the material facts applicable to this case are set forth, and therefore, we content ourselves with a reference to it; and the real question for decision in the present suit is, whether, under the will stated in that case, the present appellant took a beneficial estate in fee in the premises, or an estate in trust only, which trust, in the events which have happened, has been frustrated, and there now remains a resulting trust for the heirs-at-law of the testator. The bill asserts, that the estate was a mere estate upon a trust, which has failed; and that there is a resulting trust for the heirs-at-law; that they are, consequently, entitled to the injunction prayed for, and to other relief, as prayed in the bill. The decree was in favor of this construction of the will, and proceeded to grant the injunction, and to decree a partition accordingly.

The main clause of the will, upon which the question arises, is in the following words: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King (the appellant), son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel, his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King's, or of sister Elizabeth's, wife of John Mitchell,
*349] and to their issue." Upon the construction of the *terms of this clause, it has been already decided by this court, in 3 Pet. 346, that

William King, the devisee, took the estate upon a condition subsequent, and that it vested in him (so far as not otherwise expressly disposed of by the will), immediately upon the death of the testator. William Trigg having died without ever having had any daughter born of his wife Rachel, the condition became impossible. All the children of William Trigg and Rachel his wife, and of James King and Elizabeth Mitchell, are married to other persons; and there has been no marriage between any of them, by which the devise over, upon the default of marriage of William King (the devisee) with a daughter of the Triggs, could take effect. So that the question, what estate William King took under the devise, whether a beneficial estate, co-extensive with the fee, or in trust, necessarily arises; for no rule of law is better settled, than that where lands are devised in trust, for objects incapable of taking, there is a resulting trust for the heirs-at-law. The only difficulty is in the application of the will to particular cases, and to ascertain, whether (as Lord ELDON expressed it, in *King* v. *Denison*, 1 Ves. & Beam. 260, 272), the devisee takes subject to a particular trust, or whether he takes it for a particular trust.

In consulting the language of this clause, it is difficult to perceive any clear intention, that William King is to take, under any circumstances, a beneficial interest in fee. He is nowhere alluded to in the will as the primary object of the testator's bounty, or as, in any peculiar sense, a favored devisee. The object of the testator seems to have been, to keep his great estate together, and to pass the inheritance to some one, who should unite in himself the blood of his own family and that of his wife, and thus become the common representative of both. He does not seem to have contemplated any improbability, much less any impossibility, in such an event, and therefore, he has made no provision for the failure of offspring from such a union. Now, looking to the state of the families, at the time when the will was made, is there anything unnatural in his expectations, or extraordinary in his omission to provide for events apparently so remote and speculative. We must construe the will, then, according to its terms, and to events within the contemplation of the *testator; and not interpose limitations by conjecture, which he might have interposed, if he could have foreseen, [*350 what is now certain, the failure of the first objects of his bounty. He gives to William King, all his real estate, on condition of his marrying a daughter of William Trigg and his niece Rachel Trigg. And if the language had stopped here, there could be no doubt, that a beneficial interest in fee could have been perfected in him, upon his compliance with the condition, or upon its becoming impossible. But the implication of such beneficial estate, is repelled by the succeeding words. It is devised to him, not absolutely, upon fulfilment of the condition, but "in trust for the eldest son or issue of said marriage." It is manifest, then, that the estate was not contemplated to vest in William King beneficially; for a trust, co-extensive with the fee, is given to his issue. And it is (as was remarked by the Chief Justice in delivering the opinion of the court in the former case, in 3 Pet. 346) quite consistent with the general intention of the testator, and his mode of thinking, as manifested in his will, to suppose an intention, that in the meantime the profits should accumulate for the benefit of the issue, for whom the estate was designed. It is as clear, that in the event that the marriage should not take effect, the beneficial estate was not intended to remain with

William King. The will goes on to provide for that contingency, and declares, that in case such marriage shall not take effect, the estate shall go to any child, giving preference to age, of William and Rachel Trigg, that will marry a child of his brother James or his sister Elizabeth. So that, in the only alternative event contemplated by him, he strips the devisee of the beneficial estate, in favor of another branch of the families, uniting the blood of both by an intermarriage. It is no objection, that this devise over may be too remote to be valid in point of law. Upon that we give no opinion. It is sufficient for us, that no such objection was contemplated by the testator; and so far as his intention is expressed, it is coupled with a beneficial interest for others, excluding that of William King. To create such interest in the latter, we must supply an intention, and not construe the language of the testator. We must conjecture what he would have done, and not merely decide what he has done.

*351] It is said, that William King was a favorite nephew; and *therefore, an intention to vest a beneficial estate in him, ought to be implied. But how does that appear, in a form so imposing, as to justify such a conclusion? There is, it is true, no legacy given to him by the will; and therefore, it is suggested, that it could not have been the intention of the testator to clothe him with a barren trust. But a man, to whose issue, in events within the immediate contemplation of the testator, a splendid fortune was to pass, and in whom, in the meantime, the estate was to vest for the benefit of those who must necessarily be most near, as well as most dear to him, the objects of all his affections and all his anxieties, could hardly be deemed without some adequate equivalent for his labors in a trust which was to centre in him for the benefit of his offspring. And if no marriage should took place, which could bring such issue into existence, the subsequent devise over demonstrates, that William King was not even then first in the thoughts of the testator; but the future offspring of his relations, doubly connected by the blood of both families. They were second in preference only to the issue of William King by a Trigg, and certainly not to King himself. It has been asked, what would have been the result, if King had married a Trigg, and had had no issue by her? The answer is, that the will does not look to such an event; and as the estate was not beneficial to vest in King, in the case of a marriage and issue, it is quite too much to infer, that in all other events, the beneficial estate was to vest in him, simply because it is not declared to be in another. But it would be sufficient to say, that no such marriage did take effect; and upon the non-occurrence of that contingency, the estate was to pass over to other persons, by the very terms of the will; thus, repelling the notion that King was to take a beneficial estate, where there was neither marriage nor issue.

The argument on the part of the appellant is, that the immediate devise was a beneficial estate in fee to William King, with an executory devise over to the issue of his marriage with a Trigg, if there should be any; and as that event has not happened, the prior estate to him has never been divested. But we do not think, that this is the natural reading of the words; and the construction is repelled by the devise over, on the failure

*352] of that marriage. In order to arrive at such a conclusion, *we should be obliged to add words, not found in the will, nor implied in the context. William King is to take a fee, in trust for the issue; and the

trust is engrafted upon his estate, and is nowhere said, in a given event, to displace or supersede it. It is not a devise to him, for his own use, in fee, until he shall have issue, and then his use to cease, and a trust to arise for such issue.

It is also insisted, that the words "in trust," used in the devise, ought not to be considered as creating a mere fiduciary estate for the issue (if any), but as a legal use, to spring up by way of executory devise; and that if, by reason of the failure of such use, there is a resulting estate to the heirs-at-law, it is a legal use, for which their remedy is at law, and not a fiduciary estate for them, for which the present remedy lies in equity. There is no doubt, that the words "in trust," in a will, may be construed to create a use, if the intention of the testator, or the nature of the devise, requires it. But the ordinary sense of the term is descriptive of a fiduciary estate or technical trust; and this sense ought to be retained, until the other sense is clearly established to be that intended by the testator. Now, we think, that in the present case, there are strong reasons for construing the words to be a technical trust. The devise looked to the issue of a person not then in being; and of course, if such issue should come *in esse*, a long minority must follow. During this period, it was an object with the testator, to uphold the estate in the father, for the benefit of his issue; and this could be better accomplished by him, as a trustee, than as a mere guardian. If the estate to the issue were a use, it would vest the legal estate in them, as soon as they came *in esse*; and if the first-born children should be daughters, it would vest in them, subject to being divested by the subsequent birth of a son. A trust estate would far better provide for these contingencies than a legal estate. There is then no reason for deflecting the words from their ordinary meaning.

In cases of this sort, little aid can be gathered from the authorities; as there rarely are such coincidences in the language of wills, and the circumstances of the cases, as to lead unequivocally to the same conclusion. We have examined the authorities, however, and they do not seem to us in any *degree to interfere with the opinion we entertain on the present devise. Indeed, some of the cases strengthen the reasoning on which we rely. But a critical examination of them would occupy too much time. Our opinion then is, that the estate given to William King by the devise in question, is not a beneficial estate in fee, but an estate in trust for his issue; and that the trust having failed, there remains a resulting trust to the heirs-at-law of the testator, if the devise over does not take effect. [*353

The devise over has not as yet taken effect. There is no person who now answers the description contemplated in that devise. No child of the Triggs has as yet married a child of James King or of Elizabeth Mitchell; and in the present state of things, such a marriage is impossible. Whether the contingency, on which this devise over is to take effect, was or was not originally too remote to be good in point of law, because a marriage might take place between a child of the Triggs, then unborn, and a child of James King or Elizabeth Mitchell, at a period more remote than twenty-one years after their respective births, and yet fall within the terms of the devise, is a question upon which (as we have already said) the court will express no opinion. It does, however, create some embarrassment in the case. And the question is, whether, until such event as the contemplated marriage shall

happen, the heirs are not entitled to the relief they seek, as a resulting trust, which is at present vested in them, and which can only be displaced (if at all) by the actual occurrence of a marriage, which shall take place upon a future contingency.[1] We think, that they are entitled to the relief, leaving the case open for the rights of any person, who may hereafter rightfully claim title against them, under the devise over.

The decree of the district court is, therefore, affirmed, with costs, and the cause is remanded for further proceedings.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the western district of Virginia, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said district court, in this *cause be and the same is hereby affirmed, with costs. *354] And it is further ordered and decreed by this court, that this cause be and the same is hereby remanded to the said district court, with directions that further proceedings be had therein, according to law and justice, and in conformity to the opinion of this court.

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*355] *Reuben Withers, Appellant, *v.* John Withers, Appellee.

Partnership.

Construction of articles of copartnership, as they related to the expenses of the copartners.

Appeal from the Circuit Court of the district of Columbia and county of Alexandria. The case, as stated in the opinion of the court, was as follows:

This case comes up on appeal from the circuit court of the United States for the county of Alexandria, in the district of Columbia. The bill filed by the appellee in the court below, alleges, that, on or about the 7th of March 1815, the parties to this suit entered into copartnership, as merchants in trade, in the town of Alexandria, under the firm and style of J. & R. Withers. That the complainant, John Withers, was to furnish to the firm $15,000, and to receive three-fourths of the profits of the business; and the defendant, Reuben Withers, was to furnish $5000, and receive one-fourth of the profits; and in case of loss, it was to be borne in the same proportion; and that each party was to pay his own individual expenses. That the business was continued, upon the same terms and conditions, in all respects (the name and style of the firm having been changed to that of John Withers & Co.), until the 13th of December 1819, when it was dissolved by mutual consent and upon certain terms, which need not be here stated. The bill then alleges, that the complainant, never having received a satisfactory account of the disbursements and transactions of the defendant, whilst in New York, as a member of the firm, they were excepted out of the settlement of the partnership concerns, and the defendant agreed to render a true, full and just account of all his purchases and transactions in

[1] There is no limitation of time, in law, as to the possibility of the birth of issue; so held, where the *feme*, tenant for life, had attained the age of 75 years. List *v.* Rodney, 83 Penn. St. 483.